No. 70 Orig.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

ARIZONA
Plaintiff,

v.

NEW MEXICO
Defendant.

MOTION FOR LEAVE TO FILE COMPLAINT AND COMPLAINT

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CONSTITUTIONAL PROVISIONS

United States Constitution,
Article III, Section 2:

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.
>
> "In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

United States Constitution,
Article IV, Section 2:

> "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

United States Constitution,
Fourteenth Amendment, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

United States Constitution,
Article I, Section 8:

> "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

ARIZONA
Plaintiff,

v.

NEW MEXICO
Defendant.

MOTION FOR LEAVE TO FILE COMPLAINT

Pursuant to Rule 9 of the Rules of the Supreme Court, the State of Arizona, by its Attorney General, asks leave of this Court to file its Complaint, submitted herewith, against the State of New Mexico.

BRUCE E. BABBITT
159 State Capitol
Phoenix, Arizona 85007
Arizona Attorney General

IN THE

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OCTOBER TERM, 1975

ARIZONA
Plaintiff,
v.
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Defendant.

COMPLAINT

The State of Arizona alleges the following causes of action against the State of New Mexico.

FIRST CAUSE OF ACTION

I.

The original and exclusive jurisdiction of this Court is invoked under the authority of Article III, Section 2, Paragraphs 1 and 2 of the Constitution of the United States and 28 U.S.C. Section 1251(a)(1) (1966).

II.

Plaintiff State of Arizona and defendant State of New Mexico are sovereign states of the United States.

III.

Plaintiff herein has no plain, speedy, or adequate remedy at law and has no remedy whatsoever in any other court.

IV.

Plaintiff brings this First Cause of Action in its proprietary capacity and in that capacity will sustain substantial monetary damage as a result of the unconstitutional acts of defendant.

V.

Chaper 263 of New Mexico Laws of 1975, which became effective July 1, 1975, purports to impose a privilege tax on the generation of electrical energy within New Mexico. A copy of that Act (hereinafter referred to as the "Electrical Energy Tax" or the "Act") is attached hereto as Exhibit "A" and is incorporated herein as though set forth in detail.

Section 3.A of the Act provides:

For the privilege of generating electricity in this state for the purpose of sale, whether the sale takes place in this state or outside this state, there is imposed on any person generating electricity a temporary tax, applicable until July 1, 1984, of four-tenths of one mill ($.0004) on each net kilowatt hour of electricity generated in New Mexico.

Section 9 of the Act provides:

A. If on electricity generated outside this state and consumed in this state, an electrical energy tax or similar tax on such generation has been levied by another state or political subdivisions thereof, the amount of such tax paid may be credited against the gross receipts tax due this state.

B. On electricity generated inside this state and consumed in this state which was subject to the electrical energy tax, the amount of such tax paid may be credited against the gross receipts tax due this state.

C. The credit under Subsections A or B of this section shall be assigned to the person selling the electricity for consumption in New Mexico on which New Mexico gross receipts tax is due, and the assignee shall reimburse the assignor for the credit.

Section 9.B of the Act thus provides for a credit against the New Mexico Gross Receipts Tax for the Electrical Energy Tax paid upon electricity generated in New Mexico and consumed within New Mexico. No credit against the New Mexico Gross Receipts Tax is available with respect to the Electrical Energy Tax imposed upon electricity generated in New Mexico but consumed outside New Mexico. The interrelationship of Section 3.A and Section 9 of the Act in practical operation and effect intentionally shifts the incidence of the Electrical Energy Tax from the generation of electrical energy to the interstate transmission of electrical energy outside New Mexico.

VI.

Three Arizona entities, Arizona Public Service Company, Tucson Gas & Electric Company, and Salt River Project, own as tenants in common interests in electrical generating facilities in New Mexico. Two of the three Arizona entities are investor-owned public service corporations; the third, Salt River Project, is a political subdivision of the plaintiff. Electrical energy is generated at such facilities in response to consumer demands in Arizona, and this energy is instantaneously transmitted in interstate commerce to Arizona consumers. The generation of electrical energy in response to consumer demands in Arizona is inseparable from its interstate transmission to Arizona and constitutes interstate commerce.

VII.

Plaintiff consumes and pays for large quantities of electrical energy generated in New Mexico. The Electrical Energy Tax applies to all such electrical energy and will be paid by plaintiff through charges for energy consumed by it. Therefore, the incidence and burden of the Electrical Energy Tax falls upon plaintiff.

VIII.

Many political subdivisions of plaintiff, including community college districts, counties, cities and school districts, consume and

pay for large quantities of electrical energy generated in New Mexico. The Electrical Energy Tax applies to all such electrical energy and will be paid by such political subdivisions through charges for energy consumed by them. Plaintiff, through appropriation and revenue sharing, makes state funds directly available to its political subdivisions for the purpose of assisting in defraying the costs of local government, including payment of charges for energy consumed by them. Therefore, the incidence and burden of the Electrical Energy Tax falls upon plaintiff.

IX.

The Electrical Energy Tax constitutes an unreasonable discrimination against and an unconstitutional burden on interstate commerce.

SECOND CAUSE OF ACTION

I.

Plaintiff realleges, as though set forth in full, Paragraphs I, II, III, V, VI and IX of the First Cause of Action.

II.

Plaintiff brings this Second Cause of Action in its *parens patriae* or quasi-sovereign capacity.

III.

The vast majority of the citizens of Arizona consume and pay for electrical energy generated in New Mexico. The Electrical Energy Tax applies to all such electrical energy and will be paid by Arizona consumers through charges for energy consumed by them. Therefore, the incidence and burden of the Electrical Energy Tax falls upon Arizona citizens.

IV.

The Act discriminates, and was intended to discriminate, against the citizens of Arizona, by placing upon them the substantial burdens of the Electrical Energy Tax, a burden not borne by the citizens of New Mexico by reason of the credit provisions of Section 9 of the Act.

V.

The Act denies to Arizona citizens due process of law in violation of the Fourteenth Amendment to the United States Constitution.

VI.

The Act denies to citizens of Arizona the equal protection of the law in violation of the Fourteenth Amendment to the United States Constitution.

VII.

The Act abridges the privileges and immunities of citizens of Arizona guaranteed to them by Article IV, Section 2 of the United States Constitution.

WHEREFORE, PLAINTIFF PRAYS THAT:

1. The Court declare that the Act constitutes an unconstitutional discrimination against and burden upon interstate commerce.

2. The Court declare that the Act denies to Arizona citizens due process of law in violation of the Fourteenth Amendment to the United States Constitution.

3. The Court declare that the Act denies to citizens of Arizona equal protection of the law in violation of the Fourteenth Amendment to the United States Constitution.

4. The Court declare that the Act abridges the privileges and immunities of citizens of Arizona guaranteed to them by Article IV, Section 2 of the United States Constitution.

5. The Court restrain and enjoin the State of New Mexico from assessing, levying or collecting the tax imposed by the Act.

6. The Court award to plaintiff and against defendant plaintiff's costs expended and incurred in this suit.

7. The Court grant plaintiff such other and further relief as the Court may deem justified.

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EXHIBIT "A"

CHAPTER 263

AN ACT

RELATING TO TAXATION; IMPOSING A TAX ON THE GENERATION OF ELECTRICITY; AMENDING SECTIONS 45-4-28 AND 72-13-24 NMSA 1953 (BEING LAWS 1939, CHAPTER 47, SECTION 28 AND LAWS 1965, CHAPTER 248, SECTION 12, AS AMENDED); ENACTING A NEW SECTION 72-16A-16.1 NMSA 1953.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. SHORT TITLE.—Sections 1 through 6 of this act may be cited as the "Electrical Energy Tax Act".

Section 2. DEFINITIONS.—As used in the Electrical Energy Tax Act:

A. "bureau" means the New Mexico bureau of revenue;

B. "generation" includes manufacture and production;

C. "electricity" includes electrical energy and electrical power;

D. "person" means any individual, estate, trust, receiver, cooperative association, electric cooperative, club, corporation, company, firm, partnership, joint venture, syndicate, association, irrigation district, electrical irrigation district and any utility owned or operated by a county or municipality, and also means to the extent permitted by law, any federal, state or other governmental unit or subdivision or an agency, department or instrumentality; and

E. "sale" means selling or transferring to any person for consumption, use or resale and includes barter and exchange.

Section 3. IMPOSITION OF TAX—RATE—DENOMINATION AS ELECTRICAL ENERGY TAX.—

A. For the privilege of generating electricity in this state for the purpose of sale, whether the sale takes place in this state or outside this state, there is imposed on any person generating electricity a temporary tax, applicable until July 1, 1984, of four-tenths of one mill ($.0004) on each net kilowatt hour of electricity generated in New Mexico.

B. The tax imposed by this section shall be referred to as the "electrical energy tax".

Section 4. MEASUREMENT AND RECORDING OF KILOWATT HOURS OF ELECTRICITY.—Persons subject to the imposition of the electrical energy tax shall maintain accurate measuring devices and records to measure and record the daily and cumulative monthly and yearly totals of kilowatt hours of electricity generated or distributed in this state.

Section 5. REPORTS—REMITTANCES.—Every person subject to the imposition of the electrical energy tax shall file a return on forms provided by and with the information required by the bureau and shall pay the tax due on or before the twenty-fifth day of the second month following the month in which the taxable event occurs.

Section 6. RELIEF FROM OTHER TAXES.—Unless otherwise specified by statute the imposition of the electrical energy tax shall not act to relieve any person or activity from any other tax levied by the state of New Mexico or its political subdivisions.

Section 7. Section 45-4-28 NMSA 1953 (being Laws 1939, Chapter 47, Section 28, as amended) is amended to read:

"45-4-28. TAXATION.—Cooperative and foreign corporations, transacting business in this state pursuant to the provisions of Sections 45-4-1 through 45-4-32 NMSA 1953 shall pay annually, on or before July 1, to the state corporation commis-

sion, a tax of ten dollars ($10.00) for each one hundred persons or fraction thereof to whom electricity is supplied within this state which tax shall be in lieu of all other taxes except those provided in the Gross Receipts and Compensating Tax Act, and the Electrical Energy Tax Act; provided, however, that in the event a contract has been entered into by a rural electric cooperative and a power consumer prior to February 1, 1961, and such contract does not contain an escalator clause providing for an increase for added tax liability on the cooperative, then the sale to such power consumer shall be exempt until the expiration, extension or renewal of the contract."

Section 8. Section 72-12-24 NMSA 1953 (being Laws 1965, Chapter 248, Section 12, as amended) is amended to read:

"72-13-24. RECEIPTS—DISBURSEMENTS—DISTRIBUTION.—

A. All money received by the bureau shall be deposited with the state treasurer before the close of the next succeeding business day after receipt of the money.

B. Money received or disbursed by the bureau shall be accounted for by the commissioner as required by law or regulation of the director of the department of finance and administration.

C. Disbursements for tax credits, refunds and the payment of interest shall be made by the department of finance and administration upon request and certification of their appropriateness by the commissioner or his delegate. The state treasurer shall create a suspense fund for the purpose of making the disbursements authorized by the Tax Administration Act. All revenues collected pursuant to the provisions of Sections 72-15-1 through 72-15-37 NMSA 1953, the Income Tax Act, the Withholding Tax Act, the Gross Receipts and Compensating Tax Act, the Resources Excise Tax Act, the Liquor Excise Tax Act and the Electrical Energy Tax Act shall be credited to this suspense fund and are appropriated for the purpose of making disbursements for tax credits, refunds and the payment of interest.

D. On the last day of each month, any money remaining in the suspense fund after the necessary disbursements have been made shall be identified by tax source and transferred from the suspense fund, one-half of the receipts attributable to the electrical energy tax shall be transferred to the "electrical energy fund", hereby created, and the remainder to the state general fund, except that before the remaining money is transferred to the general fund, an amount equal to one percent of the taxable gross receipts reported for the month of deposit:

(1) for each municipality shall be distributed to each municipality; and

(2) by taxpayers who have business locations on an Indian reservation or pueblo grant in an area which is contiguous to a municipality and in which the municipality performs services pursuant to a contract between the municipality and the Indian tribe or Indian pueblo shall be distributed to the municipality if:

(a) the contract describes the area in which the municipality is required to perform services and requires the municipality to perform services that are substantially the same as the services the municipality performs for itself; and

(b) the governing body of the municipality has submitted a copy of the contract to the commissioner of revenue.

E. Disbursements to cover expenditures of the bureau shall be made only upon approval of the commissioner or his delegate.

F. Miscellaneous receipts from charges made by the bureau to defray expenses pursuant to the provisions of Section 72-13-23 and 72-13-39 NMSA 1953 and similar charges are appropriated to the bureau for its use."

Section 9. A new Section 72-16A-16.1 NMSA 1953 is enacted to read:

"72-16A-16.1. CREDIT—GROSS RECEIPTS TAX.—

A. If on electricity generated outside this state and consumed in this state, an electrical energy tax or similar tax on such generation has been levied by another state or political subdivisions thereof, the amount of such tax paid may be credited against the gross receipts tax due this state.

B. On electricity generated inside this state and consumed in this state which was subject to the electrical energy tax, the amount of such tax paid may be credited against the gross receipts tax due this state.

C. The credit under Subsections A or B of this section shall be assigned to the person selling the electricity for consumption in New Mexico on which New Mexico gross receipts tax is due, and the assignee shall reimburse the assignor for the credit."

Section 10. LEGISLATIVE INTENT.—It is the intent of the legislature that this entire 1975 act be considered not severable, and should any part hereof be declared unconstitutional, the entire act should be declared void.

Section 11. EFFECTIVE DATE.—The effective date of the provisions of this act is July 1, 1975.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

ARIZONA
Plaintiff,

v.

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Defendant.

BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT

I

THIS COURT HAS ORIGINAL AND EXCLUSIVE JURISDICTION OF THIS CONTROVERSY

Plaintiff's Motion for Leave to File Complaint seeks to challenge the constitutionality of the Electrical Energy Tax Act (the "Act") enacted by the State of New Mexico as Chapter 263, New Mexico Laws of 1975, which purports to impose a tax on the privilege of generating electricity in New Mexico. This case should not present any significant factual issues; the central constitutional issues are clearly posed by the Act itself.

This controversy between the State of Arizona and the State of New Mexico is within the original and exclusive jurisdiction of this Court under Article III, Section 2, Paragraphs 1 and 2 of the Constitution of the United States and 28 U.S.C. Section 1251(a)(1).

The State of Arizona, in its proprietary capacity, is a major consumer of electrical energy generated in New Mexico. The tax sought to be imposed by New Mexico applies to such electrical energy and will be paid for by the State of Arizona through charges for energy consumed by it. Injury, therefore, will be done the State of Arizona in its propietary capacity. *North Dakota v. Minnesota,* 263 U.S. 365 (1923). This interest is independent of the interests of its citizens. *Georgia v. Tennessee Copper Co.,* 206 U.S. 230 (1907). Further, potential injury to the educational institutions, as consumers, and as instrumentalities of the State of Arizona, is injury to the State itself. *Arkansas v. Texas,* 346 U.S. 368 (1953). Arizona has no forum other than this Court in which to assert its claim. *Illinois v. Milwaukee,* 406 U.S. 91 (1972).

The State of Arizona is also suing as *parens partriae* for and on behalf of its citizens who are consumers of electrical energy generated in New Mexico. The right of the State to bring such an action has been recognized by this Court. *Hawaii v. Standard Oil Co.,* 405 U.S. 251 (1972); *Georgia v. Pennsylvania Railroad Co.,* 324 U.S. 439 (1945). This is indeed an appropriate case for the State of Arizona to sue as *parens patriae.* The actions of the State of New Mexico threaten the very health, welfare, and comfort of the citizens of Arizona who consume electrical energy generated in New Mexico. *Pennsylvania v. West Virginia,* 262 U.S. 553 (1923). Thus, regardless of pecuniary interest, the State of Arizona has standing here to protect its citizens. *Kansas v. Colorado,* 206 U.S. 46 (1907).

STATEMENT OF THE CASE

The purpose of this litigation is to challenge the constitutionality of the Act, a copy of which is attached to Plaintiff's Complaint as Exhibit "A".

Section 3.A of the Act imposes a tax of four-tenths of a mill per net kilowatt hour of electricity generated within the State of New Mexico, ostensibly "for the privilege of generating electricity [in New Mexico] for the purpose of sale."

Section 9 of the Act grants complete relief from the tax however, for all electricity generated *and consumed in New Mexico.* The exemption is achieved by adding to the New Mexico gross receipts tax, (72-16A-16.1 NMSA 1953) a clause which exempts from the electrical generation tax (by means of a 100% credit against the gross receipts tax) "electricity generated inside this state and consumed in this state."

Other provisions of the Act establish the credit provision as the central and operational feature of the Act. Section 10 states that the Act is to be considered inseverable and "should any part hereof be declared unconstitutional, the entire Act should be declared void", thereby insuring that the citizens of New Mexico shall in no way bear any burden of the tax. The net operational effect of the Act is such that the entire burden of the tax is borne by citizens of states other than New Mexico.

The State of Arizona and its citizens are consumers of substantial amounts of electrical energy generated in New Mexico. Enormous amounts of electricity are generated at facilities located within New Mexico in response to demands for electricity in other states; such electricity is transmitted instantaneously to interstate markets over interstate transmission lines. The electrical systems of all entities owning generating facilities in New Mexico are wholly or substantially interconnected, and the amount of energy generated in New Mexico at any time is determined by the total demands of electricity on the interconnected system at that time.

QUESTIONS PRESENTED

New Mexico has enacted an Electrical Energy Tax Act which taxes all electrical energy produced in that state and consumed outside New Mexico and which exempts from the tax (by means of a tax credit) any similarly produced electrical energy consumed within New Mexico. The questions presented are:

I. Whether the tax is an unconstitutional discrimination against or burden upon interstate commerce.

II. Whether the tax imposes a discriminatory burden on nonresidents of New Mexico in violation of the Interstate Privileges and Immunities Clause or the Equal Protection Clause of the Fourteenth Amendment.

Argument

I. THE ACT IS AN UNCONSTITUTIONAL DISCRIMINATION AGAINST AND BURDEN UPON INTERSTATE COMMERCE.

A. *The Act discriminates against interstate commerce.*

This Court, in determining the constitutionality of a state tax affecting interstate commerce, is concerned with the practical application of the tax in question. Regardless of how a tax may be denominated, labeled, or measured, the ultimate question is whether the tax in fact discriminates against interstate commerce or in favor of similarly placed local or intrastate business. *Halliburton Oil Well Cementing Co. v. Reily,* 373 U.S. 64 (1963); *Alaska v. Arctic Maid,* 366 U.S. 199 (1961); *Spector Motor Service, Inc. v. O'Connor,* 340 U.S. 602, 608 (1951). ("It is not a matter of labels.").

The Act purports to impose a privilege tax on the manufacture and production of electricity in New Mexico. Beneath the label, however, the Act in fact imposes a tax which falls exclusively on the interstate transmission of electrical energy for consumption

outside the State of New Mexico. Section 3.A of the Act, which purports to impose the tax generally on all electricity generated, is followed by Section 9, which grants 100% credit against the New Mexico gross receipts tax for the electrical generation tax paid upon any electricity which is ultimately consumed in New Mexico.

In result, there is no dollars and cents tax liability for electricity generated and consumed in New Mexico; the apparent liability created by Section 3 is washed out by the credit provision of Section 9 for in-state consumption. The result is a "paper" tax erased by a "paper" credit upon all electricity generated and consumed in New Mexico.

However, for electricity generated in New Mexico and consumed outside the state, the credit provision is inoperative and the tax thereby becomes a true dollar liability at the point the electricity leaves New Mexico for consumption elsewhere. What purports to be a tax on privilege of *generating* electricity in New Mexico is in fact an unconstitutional tax imposed solely on the privilege of *transmitting* electricity in interstate commerce. *Spector Motor Service, Inc. v. O'Connor,* 340 U.S. 602 (1951).

Such complete discrimination, by artful separation of only that segment of the energy destined for out-of-state sale to bear the entire tax, is plainly unconstitutional. This Court has, in a variety of less egregious factual settings, held that states cannot single out interstate activities for special taxes that are not borne by similarly situated local activties. *Halliburton Oil Well Cementing Co. v. Reily,* 373 U.S. 64 (1963) (holding unconstitutional a Louisiana use tax that imposed different standards resulting in higher taxes on property manufactured out-of-state; *West Point Grocery Co. v. Opelika,* 354 U.S. 390 (1957) (invalidating municipal tax on wholesale grocers operating outside city on ground that effect was to discriminate against out-of-state wholesalers); *Memphis Steam Laundry Cleaner, Inc. v. Stone,* 342

U.S. 389 (1952) (voiding as violative of the Commerce Clause a Mississippi tax of $50 per out-of-state laundry truck as compared to $8 per truck within Mississippi); *Nippert v. Richmond,* 327 U.S. 416 (1946) (invalidating license tax on solicitors because of strong likelihood of discrimination against interstate commerce in favor of local business). *Cf. Alaska v. Arctic Maid,* 366 U.S. 199 (1961) (upholding a freezer ship tax upon finding that the tax did not discriminate in favor of local Alaska industry).

B. *The Act places an unconstitutional burden upon interstate commerce.*

Apart from its discriminatory effect, the Act, by directly taxing the flow of electrical energy in interstate commerce, places an impermissible burden on the flow of interstate commerce. In *Michigan-Wisconsin Pipe Line Co. v. Calvert,* 347 U.S. 157 (1954), the Court considered whether the Commerce Clause was infringed by a Texas tax on the occupation of "gathering gas", measured by the volume of gas "taken", as applied to an interstate natural gas pipeline company taking gas for the purpose of immediate interstate transmission. While the tax applied equally to gas moving in interstate and intrastate commerce, the Court noted that the statute prohibited the shifting of the tax back to the producer (presumably with the same design as the credit provision in the present case), that the statute had an inseverability provision (analogous to the inseverability provision in the present case), and that, as in the present case, the incidence of the tax had been delayed beyond the step where production had ceased and transmission in interstate commerce had begun. Characterizing the statute as in reality a tax "on the exit of gas from the state", the Court noted that the gathering of the gas into transmission lines was so integrally tied to interstate commerce that if Texas could impose such a tax, the door would be opened for the recipient and intermediary states to levy

a tax directly on the volume of the gas in the pipeline as the gas crossed their boundaries. "The net effect would be substantially to resurrect the customs barriers which the Commerce Clause was designed to eliminate." 347 U.S. at 170.

The generation and transmission of electricity in the southwestern United States in the year 1975 is inseparably a part of interstate commerce, to an extent not even conceived a few decades earlier. Electrical generating facilities throughout the southwestern states are now linked in a vast interstate grid of transmission and distribution lines. (Appendix "A", a map of the principal transmission lines on January 1, 1975 prepared by the Western Systems Coordinating Council, illustrates this fact.)

Markets demanding electrical energy are supplied from all generators on the interstate system without regard to state boundaries. Dispatchers control generation facilities throughout the interstate system to utilize the most efficient generating facilities and to minimize costs per kilowatt hour. Their decisions are made in response to demands placed on the total interstate system by all consumers without regard to state boundaries. Electricity is not generated in hope that demand will clear the available commodity from the market; rather it is generated solely in response to market demand and fluctuates on the interstate system from minute to minute each day throughout the year.

The principle of *Michigan-Wisconsin,* protecting an interstate gas transmission system from customs tariffs and the potential multiple burdens of state taxation, is even more valid and more urgently required in the present context. In the midst of an international energy crisis, with all its implications for the American economy, individual states cannot be allowed to step in and disrupt the regional and national flow of electrical energy by levying taxes directly on the volume flow of such energy.

Plaintiff does not contend that truly local activities of entities producing power cannot be taxed. New Mexico can and does levy

an ad valorem property tax on the modern, complex generating faciilties that are linked to the interstate system. New Mexico can and does levy privilege license taxes on domestic and foreign corporations such as the utilities that engage in business in New Mexico.

However, if New Mexico's power to tax is extended to a direct levy on the volume of electricity which instantaneously becomes part of a high voltage, interconnected system serving the entire Southwest, the possibilities for multiple taxation and interference with a smoothly functioning interstate energy system are obvious and impermissible. Any tax measured by the amount of electricity flowing into the interstate system invites other states similarly to tax the volume of electricity crossing their borders or passing through transformers within their borders. The result would be an impermissible direct taxation of, and the imposition of multiple burdens on, the movement of electricity in the interstate system. *Evco v. Jones,* 409 U.S. 91 (1972) (distinguishing invalid New Mexico gross receipts tax upon out-of-state sales of finished product and permissible tax upon income derived from services performed within New Mexico).

Thus as the Court recognized in *Michigan-Wisconsin,* the direct taxation of the interstate transmission of energy measured by volume, in fact, provides a method of taxation that strikes directly at the flow of interstate commerce. The flow of energy in interstate commerce, prohibited from being so taxed, is far removed from the "localized alternative incidents" which the states have been permitted to tax. *Colonial Pipeline Co. v. Traigle,* 95 S.Ct. 1538, 1543 (1975); *Joseph v. Carter & Weekes Stevedoring Co.,* 330 U.S. 422 (1947) (tax upon a stevedoring business impermissible as direct interference of the loading of an interstate carrier); *Western Union Telegraph Co. v. Texas,* 105 U.S. 460 (1882) (tax on telegrams placed into interstate commerce an unconstitutional direct interference with interstate commerce).

The holding of *Utah Power & Light Co. v. Pfost,* 286 U.S. 165 (1932) does not compel a contrary result. First, as previously discussed, the tax here at issue is, in actual operation and intended effect, a tax on the interstate transmission of electrical energy, quite unlike the tax in *Utah Power.*

Second, the nature of the electrical utility industry has changed dramatically since *Utah Power* was decided in 1932. What was once an industry characterized by small companies operating almost entirely within their service area, with only occasional, isolated interstate activity, has become a nation-wide energy system. Indeed, the creation of this national electrical energy system has been fostered and made possible by Congressional assistance. The clearest expression of the need for and desirability of a national electrical network is set forth in the Federal Power Act, 16 U.S.C. Section 824(a)(1935).

> For the purpose of assuring an abundant supply of electrical energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural resources, the [Federal Power] Commission is empowered and directed to divide the country into regional districts for the voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy, and it may at any time thereafter, upon its own motion or upon application, make such modifications thereof as in its judgment will promote the public interest.

Interstate coordination of energy transmission and sale is a relatively recent phenomenon that advances the Congressional objective of economical and reliable sale of electrical energy to consumers. To produce energy which is as economical as possible, the producers of electricity have taken advantage of "economies of scale" by building enormous generating facilities unheard of in

1932.[1] These modern facilities produce lower cost electricity than would otherwise be available by being built close to the source of fuel and water, by requiring fewer transmission and related facilities, etc. These savings are made possible by the fact that technological advances in the past forty years now allow transmission of enormous quantities of electrical energy over long distances. However, to take advantage of economies of scale, plants of the requisite capacity must be jointly owned and interconnected with other generating facilities in order to meet the goal of reliability. The interconnecting system and joint-ownership of large facilities provides essential security against the risk of a utility being unable to supply its consumers with energy in the event of a single generating facility failure. It is in this context that the business of generating electricity has become totally interstate in nature and fact.

The New Mexico tax, if sustained, could seriously distort this essential pattern of interstate electrical energy development. The scientific and engineering realities of the electric industry. which were used as the basic test in *Connecticut Light & Power Co. v. Federal Power Commission*, 324 U.S. 515 (1945) should lead this Court to conclude that the New Mexico tax is a tax on interstate commerce rather than a tax on the "local" activity of generating electricity in New Mexico. *See Fisher's Blend Station Inc., v. Tax Commission*, 297 U.S. 650 (1936).

---

[1] For example, the Four Corners Generating Plant located in New Mexico and owned by utilities located in Arizona, California, New Mexico and Texas, generated 11.777 billion kilowatt hours of energy in 1974; or nearly 12% of the 99.359 billion kilowatt hours of energy consumed in the United States in 1932.

II. THE ACT DENIES TO ARIZONA CITIZENS THE PRIVILEGES AND IMMUNITIES GUARANTEED BY ARTICLE IV OF THE UNITED STATES CONSTITUTION AND DENIES EQUAL PROTECTION OF THE LAWS IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Taxation schemes that impose special burdens on nonresidents come within an area of special concern to this Court. *Allied Stores, Inc. v. Bowers*, 358 U.S. 522, 532-33 (1959) (Separate opinion). Tax classifications by state legislatures which turn upon residence are subject to "a standard of review substantially more rigorous than that applied to state tax discrimination among, say, forms of business organizations or different traeds and professions." *Austin v. New Hampshire*, 420 U.S. 656 (1975). Furthermore, any presumption that exists in favor of the validity of state tax classifications disappears when the state legislature enacting the statute in question has declared its discriminatory purpose, *Wheeling Steel Corp. v. Glander*, 337 U.S. 562 (1949).

As previously shown, the Act establishes a discriminatory classification by means of the credit provision which exempts from taxation all electricity consumed in New Mexico and taxes only electricity consumed outside New Mexico. Moreover, there is no question that the statute was intended to place the tax on nonresidents. (See the letter and attached computations submitted herewith as Appendix "B", from Commissioner of Revenue O'Cheskey to Senator Aubrey Dunn, dated March 10, 1975, advising the sponsor of the Act of precisely how the rate of tax provision and credit provision embodied in the Act should be structured to avoid imposition of any tax burden whatsoever on New Mexico residents.)

The effect of this tax discrimination falls directly upon the citizens of Arizona who consume energy produced in and exported from New Mexico. Arizona utilities, with one minor exception, retail their electrical energy only to consumers in Arizona. For that reason, Arizona utilities incur no liability to New Mexico for its gross receipts tax which is incurred at the point of retail sale. The credit is unavailable to Arizona utilities; the generation tax therefore must be paid and added to the cost of doing business in Arizona.

The tax borne by the Arizona utilities is inevitably passed on to Arizona consumers. Unlike taxes imposed upon unregulated manufacturers and producers of goods and products, a tax imposed on a regulated entity has a predictable incident. Two of the Arizona entities subject to the electrical energy tax are investor-owned public service corporations subject to regulation by the Arizona Corpoartion Commission. As such, under the decisions of this Court, these entities must be permitted to charge rates reasonably calculated to permit them to recover operating expenses (including expenses in the nature of the electrical energy tax) and earn a fair rate of return on behalf of stockholders, a result mandating the eventual pass-through of the electrical generation tax to residents of Arizona. *See Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591 (1944); *Bluefield Water Works & Improvement Co. v. Public Service Commission*, 262 U.S. 679 (1923). The third entity, Salt River Project, is both an integral part of a federal reclamation project and a political subdivision of the State of Arizona; any costs incurred in producing electrical energy will reflect directly in charges to Arizona residents who use water and power from the Project.

The discriminatory nature of the tax violates the interstate Privileges and Immunities Clause of Article IV of the United States Constitution, which provides: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the

several States." In *Austin v. New Hampshire*, 420 U.S. 656 (1975), a case richly suggestive of the situation here confronted, the State of New Hampshire had contrived a "commuter tax" which obstensibly applied both to out-of-state residents working in New Hampshire and New Hampshire residents working outside the State. However, by virtue of a series of exemptions and credits analogous to the tax credit for gross receipts taxes paid in connection with New Mexico retail sales in this case, the overall effect of the statute was a tax payable only by out-of-state residents. In striking down the tax, this Court concluded:

> The Privileges and Immunities Clause, by making noncitizenship or nonresidence an improper basis for locating a special burden, implicates not only the individual's right to nondiscriminatory treatment but also, perhaps more so, the structural balance essential to the concept of federalism. Since nonresidents are not represented in the taxing State's legislative halls, [citation omitted] judicial acquiescence in taxation schemes that burden them particularly would remit them to such redress as they could secure through their own State; but "to prevent [retaliation] was one of the chief ends sought to be accomplished by the adoption of the Constitution." 420 U.S. 662-63 (citing *Travis v. Yale & Towne Manufacturing Co.*, 252 U.S. 60, 80 (1920).

In *Toomer v. Witsell*, 334 U.S. 385 (1948), the Court held invalid South Carolina statutes imposing disproportionate taxes on nonresident shrimp trawlers. The Court confronted a situation suggestive of the retaliatory war that will predictably occur if the electrical energy tariff is allowed to take root, stating:

> Restrictions on non-resident fishing in the marginal sea, and even prohibitions against it, have now invited retaliation to the point that the fishery is effectively partitioned at the state lines; bilateral bargaining on an official level has come to be the only method whereby any one of the States can obtain for its citizens the right to shrimp in waters adjacent to the other States. 344 U.S. at 388.

If, in the midst of a national energy crisis, the fifty states are given license to break up and dislocate a national system of electrical distribution through the use of export tariffs, the resulting disaster would dwarf the problems incurred by the shrimping industry prior to the *Toomer* decision.

By parity of reasoning, the New Mexico tax also violates the Equal Protection Clause of the Fourteenth Amendment. *Wheeling Steel Corp. v. Glander,* 337 U.S. 562 (1949) (Ohio tax statute discriminating against nonresident corporations held to violate Equal Protection Clause, the Court stating "the federal right of a nonresident 'is the right to equal treatment'."). *Cf. Travellers Insurance Co. v. Connecticut,* 185 U.S. 364 (1902).

The class of Arizona residents designated by the New Mexico Legislature as the ultimate bearer of the New Mexico tax cannot be justified under even the most liberal deference to possible legislative motives or policies. The New Mexico tax, when viewed in light of the industry to which it relates and its statutory history, declares and effects its discrimination purpose as clearly as the statute struck down by this Court in *Wheeling Steel.*

CONCLUSION

For the foregoing reasons, leave should be granted to file the proposed complaint.

Respectfully submitted,

BRUCE E. BABBITT
159 State Capitol
Phoenix, Arizona 85007
Arizona Attorney General

APPENDIX "A"

STATE OF NEW MEXICO
BUREAU OF REVENUE

Santa Fe, New Mexico

87503

March 10, 1975

MEMORANDUM

To: The Honorable Aubrey Dunn
New Mexico State Senator

From: Fred L. O'Cheskey, Commissioner
Bureau of Revenue

Subject: S-258 — Electrical Energy Tax Act

This is in reply to your inquiry in which you requested sample calculations relative to effects of this tax on utilities in New Mexico and ultimately to the consumers.

For example, let's say a utility is generating 200 million net KWH in New Mexico in a given month. The generation tax would be $80,000. Historically, the breakdown of consumption in New Mexico is as follows:

*Commercial and Industrial	66.0%
*Residential	24.0%
Sales — Other Public Auth.	6.8%
*Irrigation	1.5%
Public Street & Highway Ltg.	1.0%
Sales — Inter. Dept.	0.5%
Sales — Military	0.2%
	100.0%

Of this breakdown, the consumption items shown with an asterisk would be that portion subject to the gross receipts tax

and totals 91.5%. Applying this to the 200 million KWH generated less average line loss of 2.5% yields 195 million net KWH for sale. If the utility has the state's average taxable consumption of 91.5% subject to the gross receipts tax and the average price per KWH is 1.8¢ then the total gross receipts would be 178.4 million KWH × 1.8¢ = $3.212 million with $128,466[1] in gross receipts tax ordinarily due. The $80,000 in generation tax can be offset by the utility against the gross receipts tax ordinarily due of $128,466. The utilities customers' billing would remain the same, with the usual "passed on" gross receipts tax of 4%.

If the generating utility sells to other utilities in the state, the generation tax can be assigned along the route with the buyer reimbursing the utility generating the electricity for the generation tax. The ultimate retailer of the electricity can credit the generation tax against the gross receipts tax.

Under the generation tax rate of ½ mill per/KWH, of all the utilities in New Mexico, it appeared that only Southwestern Public Service Company might have to pass some generation tax on to New Mexico consumers. It appears that the amendment to 4/10 of a mill brings down the generation tax so that even in Southwestern's case the gross receipts tax more than offsets the generation tax.

FRED L. O'CHESKEY
Commissioner of Revenue

FLO:sd

[1] This amount of gross receipts tax is much larger in most cases since the tax also applies on the "fuel clause adjustment which varies from 10% to 50% of the basic cost of electricity.

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Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

No. 70 Original

IN THE

Supreme Court of the United States

October Term, 1975

ARIZONA,
Plaintiff,

v.

NEW MEXICO,
Defendant.

On Motion for Leave to File Original Action

BRIEF IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 70 Original

ARIZONA,
Plaintiff,

v.

NEW MEXICO,
Defendant.

On Motion for Leave to File Original Action

BRIEF IN OPPOSITION

COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. Should this Court exercise its original jurisdiction over a challenge by one state to the tax laws of another state if one of the plaintiff state's own political subdivisions and all other utilities of the plaintiff state upon which the legal incidence of the tax falls are alrea engaged in state legal proceedings against the tax which will dispose of all constitutional issues, and if neither the plaintiff state nor its citizens will suffer any actual damage during the pendency of this state litigation?

II. Does the original jurisdiction of the Supreme Court extend to a challenge by a state to the tax laws of another state on the grounds that those laws infringe upon the federal constitutional rights of individual citizens and of electrical utilities doing business in the plaintiff state?

III. Does New Mexico's tax structure as to electrical energy violate the "equivalent taxation" rule reaffirmed by this Court in *Public Utility District No. 2 of Grant County v. State of Washington*, 82 Wn.2d 232, 510 P.2d 206 (1973), app. dism'd for want of a substantial federal question, 414 U.S. 1106 (1974)?

COUNTER-STATEMENT OF THE CASE

This action raises the question of the validity of one aspect of New Mexico's tax structure with respect to electrical energy.

Receipts from the sale of electricity are taxed under New Mexico's Gross Receipts and Compensating Tax Act, 72-16A-3, N.M.S.A. 1953 (1973 Supp.). The rate of the tax is 4%.

The New Mexico Electrical Energy Tax Act, Chapter 263, Laws 1975 (a copy of Chapter 263 is attached to plaintiff's Complaint at p.8) imposes a tax on the privilege of generating electricity in New Mexico for the purpose of sale at the rate of 4/10 of one mill per kilowatt hour generated. The tax is non-discriminatory on its face: it taxes all generation regardless of what is done with the electricity after generation.

The statutory provision which is the sole basis for plaintiff's theory of unconstitutional discrimination is contained in Sec. 72-16A-16.1(B) of the New Mexico Gross Receipts and Compensating Tax Act (Sec. 9B of Chapter 263, Laws 1975):

> "On electricity generated inside this state and consumed in this state which was subject to the electrical energy tax, the amount of such tax paid may be credited against the gross receipts tax due this state."

To illustrate the operation of this provision, assume, as is actually the case, Public Service Company of New Mexico (as well as numerous other utilities in New Mexico) generates and sells power at retail in New Mexico. It may credit the amount of the electrical energy tax it must pay to New Mexico against the *greater amount* of its New Mexico gross receipts tax liability. However, neither Arizona Public Service Co., nor Tucson Gas & Electric Co., nor Salt River Project, a political subdivision of Arizona (all Arizona utilities upon which the legal incidence of the generation tax falls, as it does upon New Mexico utilities generating electricity in New Mexico) will be able to take such a credit because their sales of power are outside the state. They have no New Mexico gross receipts tax liability against which to credit electrical energy tax. Thus, the practical effect of New Mexico's statutory scheme of taxation is to impose a tax no greater than 4% on the generation, production or distribution of electricity within New Mexico.

It is significant, as will be discussed in the argument following, that all three Arizona utilities have filed a declaratory judgment action in a New Mexico court claiming that the electrical energy tax is unconstitutional. Thus, all the issues Arizona wishes to raise in this forum will eventually come to this Court via appeal of the state proceedings.

ARGUMENT

I. Even Assuming That New Mexico's Tax Structure With Respect To Electrical Energy Is Arguably Unconstitutional, Which It Is Not, Arizona's Motion Should Be Denied Under Established Precedents Of This Court.

Arizona seeks to bring before this Court two causes of action against New Mexico. The first is proprietary in nature. It is based on two grounds: (1) Arizona is itself a consumer of electricity and will, it says, sustain an increased economic

burden because New Mexico's electrical energy tax will be passed on to it* (Complaint, first cause of action, VII and VIII). (2) Arizona's political subdivision, Salt River Project, generates electricity in New Mexico (Complaint, first cause of action, VI) and is subject to the generation tax.

Its second cause of action is as *parens patriae* for its citizens, to protect their alleged rights to be free of discrimination against interstate commerce and invidious classification.

In submitting that this Court should deny Arizona's motion, we begin with the proposition that the Court will exercise its original jurisdiction only where it is clearly shown that resort to this extraordinary form of action is required. In its recent decision in *Illinois v. City of Milwaukee*, 406 U.S. 91, 93-94 (1972), the Court noted that:

> "It has long been this Court's philosophy that 'our original jurisdiction should be invoked sparingly.' . . . We construe 28 USC Sec. 1251(a) (1), as we do Art III, Sec. 2, cl 2, to honor our original jurisdiction but to make it obligatory-only in appropriate cases. And the question of what is appropriate concerns, of course, the seriousness and dignity of the claim; yet beyond that it necessarily involves the availability of another forum where there is jurisdiction over the named parties, where the issues tendered may be litigated, and where appropriate relief may be had. We incline to a sparing use of our original jurisdiction so that our increasing duties with the appellate docket will not suffer."

---

* If it is passed on in the future, it will not be because New Mexico's generation tax requires it. The legal incidence of the tax is upon the generator; only the economic burden would then be on purchasers of electricity such as Arizona. See *First Agricultural Bank v. State Tax Commission*. 392 U.S. 339 (1967), *Gurley v. Rhoden*, ____ U.S. ____, 95 S.Ct. 1605, 44 L.Ed.2d 110 (1975). Arizona's status in this respect, then, is no different from all consumers of goods or services who have at best a remote interest in the litigating of the validity of the tax.

See also *Washington v. General Motors Corp.*, 406 U.S. 109 (1972).

The Court also has recently reaffirmed its view that disputes over the states' imposition of taxes ordinarily should not be entertained in an original action. In *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 497 (1971), Justice Harlan, speaking for the Court, said:

> "As our social system has grown more complex, the States have increasingly become enmeshed in a multitude of disputes with persons living outside their borders. *Consider, for example, the frequency with which States and nonresidents clash over the application of state laws concerning taxes,* motor vehicles, decedents' estates, business torts, government contracts, and so forth. *It would, indeed, be anomalous were this Court to be held out as a potential principal forum for settling such controversies.*" [Emphasis added.]

A. There Is Now Pending An Action In A New Mexico Court Brought By Arizona's Political Subdivision, Salt River Project, Arizona Public Service Co., And Tucson Gas & Electric Co. Which Will Effectively Dispose Of All Constitutional Claims Arizona Is Attempting To Bring Before This Court.

It is significant that Arizona asks for no monetary damages in its prayer for relief, only that the generation tax be declared unconstitutional. This is so because Arizona has not sustained any damages. The only way there could be any damage to Arizona itself or to its citizens is if the three Arizona utilities generating electricity in New Mexico are held liable for the tax. Then, says plaintiff, they will be allowed by plaintiff's own Corporation Commission (see A.R.S. Sec. 40-361 *et seq.*) to pass on the tax to consumers.

Although the first returns of electrical energy tax were due September 15, 1975, (Secs. 5, 11, Chapter 263, Laws 1975 [Complaint Exhibit "A"]), the three Arizona utilities chose not to pay the tax but to file a declaratory judgment action in the District Court for Santa Fe County, New Mexico, Case No. 50245. The Complaint alleges all the constitutional infirmities raised by Arizona in this action, and more.* Thus, the very same issues which Arizona asks this Court to review are being heard by a New Mexico court of general jurisdiction in the ordinary course of its business. If on appeal the New Mexico Supreme Court should hold the tax unconstitutional, Arizona will have been vindicated, and neither it nor its citizens will have been harmed because no Arizona utility will have paid New Mexico any tax during the pendency of the litigation. If the New Mexico Supreme Court holds the tax constitutional, the issues will come to this Court by way of direct appeal under 28 U.S.C. Sec. 1257 (2). If this Court upholds the tax, Arizona can, of course, have no cause of action against a constitutional tax. The action begun in the Santa Fe County District Court will ultimately dispose of all the contentions Arizona wishes this Court to hear now, and Arizona is participating in that action through its political subdivision, Salt River Project. There is, thus, no sound reason for this Court to hear Arizona's complaint, and this is especially true in view of the long-standing congressional and judicial policy not to intervene in state tax matters. 28 U.S.C. Sec. 1341; *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943); *Toomer v. Whitsell*, 334 U.S. 385 (1948); *Matthews v. Rodgers*, 284 U.S. 521 (1932).

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* A copy of the Complaint is printed in Appendix A attached hereto. A copy of New Mexico's motion to dismiss the Complaint is printed in Appendix B. This motion tests the constitutional merits of the Complaint. It also asks that the Court dismiss for lack of subject matter jurisdiction, which is merely a contention that the *forum* for litigating plaintiff's constitutional arguments should change to administrative proceedings under Sec. 72-13-38, N.M.S.A. 1953 (1973 Supp.) because the plaintiffs are not claiming a refund.

If the Court should accept jurisdiction over Arizona's complaint, New Mexico would move the Court to consider staying any further proceedings in this case until appeal of the state case to this Court has been perfected. Such action would be particularly appropriate in order to avoid duplicative effort in the two forums.

B. The Privileges And Immunities Clause Of Article IV And The Equal Protection Clause Of The Fourteenth Amendment Upon Which Arizona Relies May Be Invoked Only By Individual Citizens And Not By States. It Would Be Inappropriate To Grant Jurisdiction Over Arizona's Proprietary Claim Under The Commerce Clause Where All Arizona Utilities Are Already Litigating The Constitutionality Of The Tax And That Litigation Will Resolve The Issues Arizona Raises In The Complaint.

That this Court should not grant Arizona's motion is evident from *Massachusetts v. Missouri*, 308 U.S. 1, 17 (1939). There the Court refused to hear Massachusetts' attempt to enjoin Missouri from taxing property in trusts established by a decedent Massachusetts domiciliary, holding that original jurisdiction could not be invoked on behalf of its residents to challenge the imposition of taxes by Missouri. Here, too, if Arizona's citizens are denied equal protection and denied privileges and immunities accorded New Mexicans, they themselves may raise the claims. The constitutional guarantees of these two clauses extend to individuals and not to states. A state is not a "person" entitled to equal protection of the laws under the Fourteenth Amendment, *Wisconsin v. Zimmerman*, 205 F.Supp. 673 (W.D. Wis. 1962), *cf. South Carolina v. Katzenbach*, 383 U.S. 301, 323-24 (1966), nor a "citizen" entitled to the rights of the privileges and immunities clause. *Hague v. C.I.O.*, 307 U.S. 496, 514 (1939); *Paul v. Virginia*, 75 U.S. 168, 178-80 (1868). Indeed, it is noteworthy that *Austin v. New Hampshire*, 420

U.S. 656 (1975), upon which Arizona relies, was successfully pursued by individual taxpayers, as has every other challenge brought before the Court to the validity of a tax on privileges and immunities or equal protection grounds. See *e.g.*, *Wheeling Steel Corp. v. Glander*, 337 U.S. 562 (1949); *Toomer v. Witsell*, 334 U.S. 385 (1948); *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60 (1920); *Travellers Insurance Co. v. Connecticut*, 185 U.S. 364 (1902); *Ward v. Maryland*, 79 U.S. (12 Wall) 418 (1870). Whatever the result might be of an individual action brought by an Arizona consumer, it is clear that Arizona has no *parens patriae* cause of action on equal protection or privileges and immunities grounds.

As for its proprietary right of action, defendant submits that it should also not be heard by this Court. Arizona must, of course, represent an interest of her own and not merely that of her citizens or corporations. *Arkansas v. Texas*, 346 U.S. 368, 370 (1953). True, in *Pennsylvania v. West Virginia*, 262 U.S. 553 (1922), the Court did grant original jurisdiction over a commerce clause claim that a state was, by regulatory action against gas utilities, shutting off the supply of natural gas to neighboring states heavily dependent on the gas. But in this case New Mexico is not taking any action which will cut off or even reduce the flow of interstate commerce in electricity; it is merely taxing the generation of electricity, an activity which for over four decades has been held a local event that the states are free to tax. *Utah Light & Power Co. v. Pfost*, 286 U.S. 165 (1932). Moreover, Arizona's political subdivision, Salt River Project, is at present participating as a party plaintiff in a declaratory judgment action in New Mexico which will dispose of all the constitutional arguments Arizona asks to raise here. And as long as the New Mexico litigation lasts, the Arizona utilities will pay no generation tax, hence Arizona will not have to bear any increase in the price it pays for electricity. Thus, in view of the existence of that litigation Arizona will never be damaged by the tax, and the only substantial interest Arizona is advocating here is that of her utilities. We submit that this Court should not assume jurisdiction over so insubstantial a proprietary claim as Arizona's.

II. New Mexico's Electrical Energy Tax Neither Discriminates Unconstitutionally Against Interstate Commerce Nor Does It Burden Interstate Commerce.

A. New Mexico's Tax Structure Subjects The In-State Disposition Of Electricity To A Greater Rate Of Taxation Than Electricity Generated For Sale Outside The State; Hence, Under Well-Established Precedents Of This Court The Act Does Not Discriminate Against Interstate Commerce.

The heart of plaintiff's argument is the foremost contention in its brief that New Mexico discriminates against the interstate commerce carried on by Arizona Public Service Co., Tucson Gas & Electric Co. and Salt River Project. These utilities generate electricity in New Mexico but sell it in Arizona.

Plaintiff's argument is simple: only those utilities generating electricity in New Mexico that sell the electricity in New Mexico are entitled to the gross receipts tax credit. This discriminates, plaintiff says, against Arizona utilities generating electricity in New Mexico. This contention is misconceived because it rests upon (1) a misunderstanding of the scope and operative effect of New Mexico's tax structure as to electricity; (2) the assumption that the Arizona utilities in generating electricity are engaged in interstate commerce; and (3) a reliance on cases of this Court which are not on point. Moreover, plaintiff fails to cite the cases which are controlling, the most important of which is *Public Utility District No. 2 of Grant County v. State of Washington*, 82 Wn.2d 232, 510 P.2d 206 (1973), appeal dismissed for want of a substantial federal question, 414 U.S. 1106 (1974). Others are *South Carolina Power Co. v. South Carolina Tax Comm'n*, 52 F.2d 515 (E.D.S.C. 1931), aff'd 286 U.S. 525 (1932); *Hinson v. Lott*, 75 U.S. 148 (1869); *Gregg Dyeing v. Query*, 286 U.S. 472 (1931); *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937); *Southern Pacific Co. v. Gallagher*, 306 U.S. 167 (1939); *Doscher v. Query*, 21 F.2d 521

(E.D.S.C. 1927); and *Oldetyme Distillers, Inc. v. Gordy*, 17 F. Supp. 424 (D.Md. 1936). Furthermore, plaintiff fails to discuss or distinguish *Alaska v. Arctic Maid*, 366 U.S. 199 (1961), a case which squarely rejected the very contention plaintiff makes in this case.

The fundamental flaw in plaintiff's discrimination argument is that it is based on too narrow a view of the question. Plaintiff would look solely to the question of how the generator of electrical energy is taxed. In taking this narrow approach, it ignores two critical points. First, the practical operation and effect of a tax on the subject or article of commerce, *not the tax status of a particular taxpayer*, controls in determining whether a tax discriminates against interstate commerce under the Commerce Clause. There must be taken into account the impact of the total scheme of state taxation, rather than just the impact on a particular taxpayer.

Second, there is no discrimination against interstate commerce if the commodity of commerce, in this instance electricity, is subject to equivalent taxation by New Mexico. Receipts from sales of electrical energy at retail in New Mexico are taxed at the rate of 4%; the Electrical Energy Tax burden on Arizona utilities generating in New Mexico will never be greater than that. In fact, it will be substantially less. Thus, there is equivalence of taxation as is required under the cases discussed below.

These two points will be discussed in subsections 1 and 2 which follow.

1. The Tax Burden On A Particular Taxpayer Or Particular Taxable Incident Is Not Controlling. The Total Tax Structure Must Be Considered In Determining Whether An Unconstitutional Discrimination Exists.

We are not here concerned primarily with the impact of a particular tax on particular taxpayers. Rather, the basic inquiry

must be whether or not New Mexico's total tax structure discriminates against interstate commerce. The correctness of this broad approach has been recognized by this Court in resolving the discrimination question in the early case of *Hinson v. Lott*, 75 U.S. 148 (1869), and the more recent use tax discrimination cases of *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937), and *Southern Pacific Co. v. Gallagher*, 306 U.S. 167 (1939). It was also recognized by the Supreme Court of Washington and this Court in an electrical energy tax case so analogous to this case as to be dispositive of the issue here presented, *Public Utility District No. 2 of Grant County v. State*, 82 Wn.2d 232, 510 P.2d 206 (1973), appeal dismissed for want of a substantial federal question, 414 U.S. 1106 (1973).*

In the *Public Utility District No. 2* case, the Washington Supreme Court had before it a Washington tax on generation of electricity which allegedly discriminated against utilities that sold electricity out of state. Instead of a credit system like New Mexico's, Washington taxed the sale of power at every level of distribution, but allowed a *deduction* for receipts from resale of the power in-state. If the power was resold out-of-state, the deduction was not available. The utilities argued that the unlawful discrimination occurred because the wholesaler or generator who sold for resale in the state received the deduction, while the wholesaler or generator who sold to an Oregon utility for resale in Oregon did not. To this argument the Washington court responded:

> ". . . a proper analysis must take the whole scheme of taxation into account to determine whether the actual operation of that taxing structure in its relationship to intrastate and interstate commerce results in an unconstitutional discrimination against the latter. [Here the

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* The appeal to this Court was based on the contention that the Washington electrical energy tax discriminated against interstate commerce in violation of Article I, Sec. 8 of the United States Constitution. The dismissal by this Court means that the case was decided *on the merits* and that lower courts presented with the same issue are bound by the decision. *Hicks v. Miranda*, ____ U.S. ____, 95 S.Ct. 2281, 45 L.Ed.2d 223 (1975).

Court footnotes 12 U.S. Supreme Court and state court decisions.]

* * *

"*Considered in isolation,* as urged by respondents, the Washington tax deduction provision may also be discriminatory; it was intended to apply solely to sales for resale within this state. Alone, it may be invalid, but *it does not stand alone,* and this fact, and the failure of the respondents and the trial court below to so recognize, results in their abbreviated analysis. This isolated evaluation led the trial court in Silas Mason Co. v. Henneford, 15 F.Supp. 958 (E.D.Wash. 1936), rev'd, 300 U.S. 577, 57 S.Ct. 524, 81 L.Ed. 814 (1937), to declare invalid the tax in question. Similarly, here, it could lead us to strike down the tax assessment without having correctly evaluated the taxing scheme's operation.

"This scheme contains no constitutional infirmity, for 'There is no demand in [the] Constitution that the state shall put its requirements in any one statute. It may distribute them as it sees fit, if the result, taken in its totality, is within the state's Constitutional power.' Gregg Dyeing Co. v. Query, 286 U.S. 472, 480, 52 S.Ct. 631, 634, 76 L.Ed. 1232 (1932). A similar deduction provision, RCW 82.03.430(6), was at issue in Crown Zellerbach in which a unanimous court found that to disallow the deduction ignores the lawful purpose behind its operation. Imposition of actual tax liability is the purpose advanced by such statutes in an effort to avoid double or triple tax liability as to particular products or activities. 'In other words, the policy is to impose *actual liability* for payment of tax only once. . .' Crown Zellerbach Corp. v. State, supra, 45 Wash. 2d at 753, 278 P.2d at 308." 510 P.2d at 210 [Emphasis added.]

In *Hinson v. Lott, supra,* the combined effect of a distiller's (manufacturing) tax and a merchant's tax on the sale of imported liquor was considered. The merchant's tax was attacked on the ground that it discriminated against interstate commerce, by reason of the fact that it applied only to the sale of liquor

imported into the state. This Court sustained the tax, holding that no discrimination existed, in view of the fact that locally produced liquor, while not subject to the merchant's tax, was subject to the distiller's tax. These taxes were equivalent in amount but imposed on different taxpayers.

In the *Gallagher* and *Henneford* cases, this Court sustained use taxes imposed on products purchased without the state, holding that no discrimination existed in view of the fact that sales taxes were imposed on products sold within the state. This approach has been used to strike down, as well as sustain, state taxes. Thus, in *Halliburton Oil Well Cementing Co. v. Reily,* 373 U.S. 64 (1963), a use tax was found invalid as applied to an out-of-state fabricator using the fabricated goods in Louisiana, but this Court reaffirmed the broad approach of analyzing the entire tax structure. 373 U.S. 69-70.

These cases illustrate the proposition that it is the practical effect of the *total state tax burden* as applied to the commodity of commerce, here electrical energy, which ultimately controls.

2. The New Mexico Tax Structure With Respect To Electrical Energy Does Not Discriminate Against Interstate Commerce.

As clearly established by the cases discussed in the preceding subsection, the total tax burden imposed on different taxpayers or imposed on different aspects of one subject of taxation, here electricity, must be considered together in analyzing a claim of discrimination against interstate commerce. If the commodity of commerce (in *Hinson,* liquor, in *Southern Pacific Co. v. Gallagher* and *Henneford,* tangible personal property and in *Public Utility District No. 2* and in this case electrical energy) is subject to equivalent taxation by the state, whether ultimate use and consumption be within or outside this state, there is no discrimination.

The only basis for any discrimination argument is the credit against gross receipts tax allowed by Sec. 72-16A-16.1(B),

N.M.S.A. 1953 (1975 Interim Supp.), the text of which was set forth previously in this brief. The obvious purpose of this provision is to collect a tax only once from in-state sellers, not to impose the generation tax in addition to the 4% gross receipts tax. The in-state sale of electricity generated in New Mexico is not exempted; it is taxed, just as the out-of-state electricity is, and at the significantly *higher* rate of 4%. The legislative purpose is no different from that found by the Washington Supreme Court in the case of *Public Utility District No. 2 v. State, supra,* where it sustained a privilege tax on electricity so close to the tax at issue here as to the foreclose plaintiff's commerce clause contentions in this case.

The tax in *Public Utility District No. 2 v. State* was a privilege tax on the light and power business measured by gross income. The tax was imposed at every level of distribution. The deduction which allegedly violated the commerce clause read as follows, 510 P.2d at 207, fn. 2:

> "Deductions in computing tax. 'In computing tax there may be deducted from the gross income the following items:
> " '. . . (2) Amounts derived from the sale of commodities to persons in the same public service business as the seller, *for resale* as such *within this state. . .*' " [Emphasis added.]

The public utility districts sold power at wholesale to Washington utilities for resale in Washington. The income from these sales was deductible. They also sold at wholesale to Oregon utilities for resale in Oregon. The income from these sales was not deductible, producing the alleged discrimination. The Washington Supreme Court conceded that, viewed in isolation, the deduction provision could be discriminatory, but it went on to rule that the provision must also be considered in the light of the whole statutory framework for taxation of the subject matter:

> "*The* public utility *tax on electrical power* originating in this state *is to be imposed only once* under the Washington taxing scheme. The deduction here at issue permits this singular tax imposition by preventing the pyramiding

> effect of the public utility tax, which is otherwise certain to occur. The only relevant difference between the present case and Crown Zellerbach is that, rather than having an interrelated tax structure (manufacturing-wholesaling) imposed, this case has a shifting tax structure in which singular tax liability exists but shifts to another utility. By so doing, the in-state distribution of the use of power is *not* exempted and is taxed, just as is the out-of-state distribution of power. Equal treatment is the theme of this system. H & D Communications Corp. v. Richland, 79 Wash.2d 312, 484 P.2d 1141 (1971). The out-of-state utility is in no worse position than its instate competitor. The state is playing no favorite with its resident businesses at the expense of similarly situated out-of-state enterprises.
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> * * *
>
> "The confusion results, in part, because the respondents look only to their status as complaining public utilities at the time of their sales to in-state or out-of-state purchasers, and not to the impact of the total tax structure on the subject matter here involved, the disposition and use of power. *If the whole tax scheme is evaluated, the tax deduction that is made at the sale to a Washington utility is made up at the time the Washington utility buyer sells to its customers.* Thus, 'In the instant case, there is no burden on interstate commerce that is not placed on intrastate commerce.' H & B Communications Corp. v. Richland, supra, 79 Wash.2d at 314, 484 P.2d at 1144. The in-state and out-of-state disposition of power is equally treated. There is tax equivalence here and no discrimination on interstate commerce.
>
> "Judgment reversed." 510 P.2d at 211. [Emphasis added.]

Similarly, New Mexico's intention with respect to electrical energy generated and sold by utilities in New Mexico is that the transactions be taxed only once. Consequently, the legislature has provided that the electrical energy tax may be credited against the gross receipts tax due on subsequent sales in New Mexico. Obviously, the same result could have been accomplished by imposing the type of tax and deduction sustained

in the Washington *Public Utility District No. 2* case. The tax effect is the same in both structures; the difference lies only in the form of the two systems, not in their substance.

There are a number of other precedents which strongly support the constitutionality of New Mexico's choice to allow the electrical energy tax credit against gross receipts tax. These cases consider not the impact of a particular tax on particular taxpayers, but whether the total tax structure with respect to electrical energy discriminates against interstate commerce.

A South Carolina statute containing the credit feature of New Mexico's tax scheme was considered in *South Carolina Power Co. v. South Carolina Tax Commission,* 52 F.2d 515 (E.D.S.C. 1931), aff'd 286 U.S. 525 (1932). South Carolina imposed a tax of 5/10 of one mill upon each kilowatt hour of electric power *generated* in South Carolina and also an excise tax of 5/10 of one mill upon each kilowatt hour of electricity *sold* in the state. This statute provided that if the seller subject to the sales tax procured electric power which was subject to the payment of the privilege tax, a *credit* on the sales tax in the amount of the privilege tax already paid by the person generating the electricity would be allowed. Utilities attacked the South Carolina taxes as unconstitutionally burdening and discriminating against interstate commerce. In commenting upon this statutory scheme the court noted:

> "The evident purpose of the act is to impose a tax upon the current used within the State and to impose it at the source or as soon as the current becomes subject to the jurisdiction of the taxing power, but not to impose but once. . . . If current produced as well as sold within the state were subjected to the sales tax such current would rest under a double burden of taxation. To avoid this and at the same time to preserve the system of taxing at the source, current which is produced within the state is taxed at the time of generation but is relieved of the sales tax, which is equal in amount, with the result that all currents sold within the state, whether produced there or brought in from another state, pays exactly the same tax." 52 F.2d at 521

In resolving the question of validity of the tax on the generation of electrical current, the court upheld the tax on the basis of taxable events *preceding* interstate commerce on authority of *Oliver Iron Mining Co. v. Lord,* 262 U.S. 172 (1923), *Hope Natural Gas Co. v. Hall,* 274 U.S. 284 (1927) and *American Manufacturing Co. v. St. Louis,* 250 U.S. 459 (1919). In reference to current brought into the state which was subject to the sales tax the court said:

> "The point that the tax on sales is a discrimination against current which has passed in interstate commerce, because current which has paid the local generation tax is exempted from the sales tax, has already been considered in discussing the points raised under the Fourteenth Amendment. The cases of Hinson v. Lott, supra, 8 Wall.148, 19 L.Ed. 387 and Doscher v. Query, supra (D.C.) 21 F. (2d) 521, 525, sufficiently answer this proposition." 52 F.2d at 526.

Citing the *South Carolina Power* and *Hinson* cases, *Oldetyme Distillers, Inc. v. Gordy,* 17 F.Supp. 424 (D.Md. 1936) also held that a whiskey manufacturing tax credit against a subsequent sales tax did not discriminate against interstate commerce.

The totality of a state's pattern of taxation was recognized by this Court in the license tax case of *Alaska v. Arctic Maid,* 366 U.S. 199 (1961). Alaska imposed a "license" tax upon only the business of operating freezer ships and other floating cold storages, measured by the value of fish obtained for processing through freezing. In fact, the tax fell only upon out-of-state businesses because they were the only ones who operated freezer ships. The ship operators purchased fish caught in Alaskan territorial waters, froze the fish and then transported the fish to the State of Washington for canning. They alleged that the Alaskan taxing scheme discriminated against their interstate businesses because (1) there was no tax on fish caught and frozen in Alaska and destined for canning in Alaska, and (2) fish processors selling fresh frozen fish in the Alaskan consumer market were taxed at a lower rate.

This Court first found that the license tax was imposed upon an occupation made up of local activities within the reach

of Alaska's taxing authority, citing *Oliver Iron Mining v. Lord, supra,* and *Michigan-Wisconsin Pipe Line Co. v. Calvert,* 347 U.S. 157 (1954). It then held that the tax in question did not discriminate against interstate commerce because in-state businesses which had to pay other local taxes rather than the license tax, were not preferred against out-of-state competitors. The Court reasoned that there could be no discriminatory preference in favor of local canners because they paid a greater tax upon fish obtained for canning. The Court stated:

> "When we look at the tax laid on local canners and those laid on 'freezer ships', there is no discrimination in favor of the former and against the latter. For no matter how the tax on 'freezer ships' is computed, it did not exceed the six per cent tax on the local canners. Hence cases such as Pennsylvania v. West Virginia [citation omitted] which hold invalid state laws that prefer local sales or interstate sales, are inapposite." 366 U.S. at 204-205.

In this case, the generation tax on electrical energy, no matter how it is computed, does not exceed the 4% burden on in-state disposition of power.

In *Gregg Dyeing Co. v. Query,* 286 U.S. 472 (1931), this Court upheld a complementary taxing statute imposed on gasoline brought into the state for storage, use and consumption against the contention that the statute discriminated against interstate commerce. In disposing of this argument, the Court construed a separate statute *in pari materia* and concluded it imposed an equivalent tax on use and consumption of gasoline in the state.

Henneford v. Silas Mason Co., supra, Southern Pacific Co. v. Gallagher, supra, and *Hinson v. Lott, supra,* also support the proposition that New Mexico's generation tax and gross receipts tax credit work no discrimination against plaintiffs because the New Mexico burden on in-state disposition of electricity is greater than the generating tax on electricity taken out of New Mexico.

New Mexico's tax structure with respect to electricity is not distinguishable constitutionally from the electrical energy tax cases of *Public Utility District No. 2* and *South Carolina Power Co.*; the liquor cases of *Hinson v. Lott* and *Oldetyme Distillers;* the sales and use tax cases of *Gallagher* and *Henneford v. Silas Mason Co.*; and the license tax case of *Arctic Maid.* These cases establish that the tax burden imposed on different taxpayers or imposed on different incidents of taxation must be considered together in resolving the discrimination issue. And they held that there is no discrimination against interstate commerce if the commodity of commerce, here electrical energy, is subject to equivalent taxation by the state, whether or not the ultimate use and consumption is within or without the state.

The issue of discrimination against interstate commerce is a practical one, not an abstract or academic question. As stated by this Court in *McGoldrick v. Berwind-White Coal Mining Co.,* 309 U.S. 33, 45 fn. 2 (1940):

> "Despite mechanical or artificial distinctions sometimes taken between the taxes deemed permissible and those condemned, the decisions appear to be predicated on a practical judgment as to the likelihood of the tax being used to place interstate commerce at a competitive disadvantage." [Reference to numerous cases follows in the footnote.]

In the *Arctic Maid* case, the Court reasoned that there could be no such discriminatory competitive preference, since Alaskan processors freezing fish for the local retail market were not in competition with processors freezing fish for canning out of state. This was precisely the same reasoning approved by this Court in the *Public Utility District No. 2* case where it was held that there was no discriminatory preference for in-state business because:

> ". . . the public utility districts selling out-of-state are not in competition with one who sells in-state." 510 P.2d at 210.

Similarly, the Arizona utilities taxed under the Electrical Energy Tax Act are not in competition with New Mexico electrical utilities, and plaintiff does not allege that they are.

New Mexico seeks to tax the generation of electrical energy in this state. All generators of electrical energy in this state must pay the tax. That the electrical energy tax may be credited against gross receipts tax is only to prevent in-state power from being subjected to more than a 4% tax. It does not have the effect, under New Mexico's tax structure, of exempting the in-state generation and sale of power. This state's tax structure on electrical energy is designed to subject to one tax, but only one tax, the commodity of electrical energy. The taxation of this subject does not discriminate against interstate commerce.

In its complaint (second cause of action, Par. IV) and brief (pp. 21, 23, 26) Arizona makes much over its allegation that the New Mexico legislature intended to discriminate against Arizonans and interstate commerce. This allegation is reminiscent of the one made in *Heisler v. Thomas Colliery Co.*, 260 U.S. 245 (1922). There, plaintiffs claimed that the Governor of Pennsylvania advocated enactment of a tax on coal production because it would exact "tribute" from interstate commerce. This Court said, 260 U.S. 258-59:

> "The contention that the tax is a regulation of interstate commerce seems to be based somewhat upon the declaration of the Governor of the State of its effect upon consumers in other States. We are unable to discern in the fact any materiality or pertinency, nor in the fact that Pennsylvania has a monopoly (if we may use the word) of the coal. Whether any statute or action of a State impinges upon interstate commerce depends upon the statute or action, not upon what is said about it or the motive which impelled it. . . ."

B. The Electrical Energy Tax Act Does Not Burden Interstate Commerce. The Generation Of Electricity Is A Local Activity Which New Mexico May Tax.

The question whether New Mexico's generation tax discriminates against the interstate commerce of the Arizona utilities because of the presence of the credit against gross receipts taxes has been answered by the ample precedents of this Court. Leaving the discrimination-credit question, we turn to the question whether the generation tax burdens interstate commerce. Here, too, the case law of this Court indicates that it does not. The tax is imposed upon the local activity of generation. The New Mexico legislature intended to tax "the privilege of generating electricity in this state for the purpose of sale;" this is not a tax on interstate commerce.

The following cases all support the proposition that the states may tax an intrastate activity such as the generation of electricity: *Utah Power & Light Co. v. Pfost*, 286 U.S. 165 (1932); *Oliver Iron Mining Co. v. Lord*, 262 U.S. 172 (1923); *Hope Natural Gas Co. v. Hall*, 274 U.S. 284 (1927); *American Manufacturing Co. v. St. Louis*, 250 U.S. 459 (1919); *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157 (1954); *Heisler v. Thomas Colliery Co.*, 260 U.S. 245 (1922); and *Federal Power Commission v. Union Electric Co.*, 381 U.S. 90 (1964).

Utah Power & Light Co. v. Pfost is precisely on point. There the appellants generated electricity in intrastate commerce and also transmitted electricity in interstate commerce, just as the Arizona utilities involved in this case do. The activity of generation was taxed by Idaho under a statute indistinguishable from New Mexico's:

> "any individual . . . engaged in the generation of . . . of . . . electrical energy . . . for . . . sale . . . shall . . . pay thereon a license tax of one-half mill per kilowatt hour. . . ." 286 U.S. at 175.

The Court held that the tax did not, as to electricity transmitted outside the taxing state, impose an unconstitutional burden on interstate commerce. Just as Arizona contends here, Utah Power & Light Company argued that it was the interstate transmission which constituted the subject of taxation since the

transmission could not be separated from the generation or production of electrical energy. In disposing of Utah Power's argument, this Court found that the generation or production of electrical energy is analogous to the manufacture of a more tangible product and concluded that the Idaho tax was imposed on a valid local privilege.

After analyzing the process by which electrical energy is created and transmitted, the Court concluded, 286 U.S. 181-82:

> "We are satisfied, upon a consideration of the whole case, that the process of generation is as essentially local as though electrical energy were a physical thing; and to that situation we must apply, as controlling, the general rules that commerce does not begin until manufacture is finished, and hence the commerce clause of the Constitution does not prevent the state from exercising exclusive control over the manufacture. Cornell v. Coyne, 192 U.S. 418, 428, 429, 48 L.ed. 504, 508, 509, 24 S.Ct. 383. 'Commerce succeeds to manufacture, and is not a part of it.' United States v. E.C. Knight Co., 156 U.S. 1, 12, 39 L.ed. 325, 329, 15 S.Ct. 249."
>
> "Without regard to the apparent continuity of the movement, appellant, in effect, is engaged in two activities, not in one only. So far as it produces electrical energy in Idaho, its business is purely intrastate, subject to state taxation and control. . . . The situation does not differ in principle from that considered by this court in Oliver Iron Min. Co. v. Lord, 262 U.S. 172, 67 L.ed. 929, 43 S.Ct. 526. There the State of Minnesota has imposed an occupation tax on the business of mining ores. . . ."

Utah Power & Light remains good law. See, *e.g., Parker v. Brown,* 317 U.S. 341, 360 (1943); *Michigan-Wisconsin Pipe Line Co. v. Calvert,* 347 U.S. 157 (1954); *Federal Power Commission v. Union Electric Co.,* 381 U.S. 90 (1964).

In *Michigan-Wisconsin Pipe Line Co. v. Calvert, supra,* the Court dealt with a tax on the activity of "gathering gas" as applied to an interstate pipeline company. It struck down the tax, holding that it was upon interstate commerce itself. The

Court distinguished such a tax from valid taxes imposed upon local commerce before interstate commerce has begun, citing *Utah Power & Light Co. v. Pfost, supra; Hope Natural Gas Co. v. Hall, supra* (tax on production of gas is not violative of the commerce clause since production precedes interstate commerce); and *Oliver Iron Mining Co. v. Lord, supra* (mining of ore is local event, not part of interstate commerce, which state is free to tax). Two similar cases hold that manufacturing, *American Manufacturing Co. v. St. Louis, supra,* and mining of coal, *Heisler v. Thomas Colliery Co., supra,* are all events preceding interstate commerce which the states may tax.

Under long-established cases of this Court, then, New Mexico's generation tax very clearly does not burden interstate commerce.

III. New Mexico's Electrical Energy Tax Structure Does Not Violate The Equal Protection Or Privileges And Immunities Clauses Of The United States Constitution.

Plaintiff contends that the New Mexico legislature has without reasonable basis classified Arizona utilities generating electricity, upon whom the legal incidence of the tax falls, differently from other taxpayers of the same class. However, Plaintiff fails to note that under both the equal protection and privileges and immunities clauses, the legislature has very broad power to classify for taxation purposes. In fact, there is a rational basis for distinguishing between generators of electricity who are subject to New Mexico gross receipts tax on the subsequent sale of the power and those who are not.

Concerning the power of state legislatures to classify for taxation purposes, the Court in *Madden v. Kentucky,* 309 U.S. 83, 88 (1940), said:

> "This Court fifty years ago concluded that 'the Fourteenth Amendment was not intended to compel the State to adopt an iron rule of equal taxation,' and the passage of time has only served to underscore the wisdom of that

recognition [illegible] the large area of discretion which is needed by a legislature in formulating sound tax policies. Traditionally, classification has been a device for fitting tax programs to local needs and usages in order to achieve an equitable distribution of the tax burden. It has, because of this, been pointed out that *in taxation, even more than in other fields, legislatures possess the greatest freedom in classification.* The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." [Emphasis added; footnotes omitted.]

It then upheld a state's classification taxing deposits in banks outside the state at 50 cents per thousand and deposits in banks within the state at only 10 cents per thousand.

In *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973), reh. den., 411 U.S. 910 (1973), the Court upheld a state *ad valorem* personal property tax imposed on corporations which was not imposed on individuals. The court there stated the equal protection test in the following language:

> "The Equal Protection Clause does not mean that a State may not draw lines that treat one class of individuals or entities differently from the others. The test is whether the difference in treatment is an invidious discrimination. Harper v. Virginia Board of Elections, 383 U.S. 663, 666. Where taxation is concerned and no specific federal right, apart from equal protection, is imperiled, [citing as an example a tax that discriminates against interstate commerce such as one on the "gathering of gas" shipped interstate, Michigan-Wisconsin Pipeline Co. v. Calvert, 347 U.S. 157 (1954)] the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation." 410 U.S. at 359.

Of course, as discussed in this brief, the generation tax is not a tax on interstate commerce, nor does New Mexico's tax structure discriminate against interstate commerce.

Allied Stores of Ohio v. Bowers, 358 U.S. 522, 528 (1959) laid down the following test:

> ". . . Similarly, it has long been settled that a classification, though discriminatory, is not arbitrary nor violative of the Equal Protection Clause of the Fourteenth Amendment if any state of facts reasonably can be conceived that would sustain it."

Thus, the only inquiry to be made is whether there is any reasonable basis for classifying or treating generators of electricity who do not sell that electricity in New Mexico any differently than generators who do.

Presumably, plaintiff says that the class for purposes of their argument consists of all generators of electricity. Only those who sell their electricity in New Mexico are entitled to credit electrical energy tax against gross receipts tax. This works an unconstitutional discrimination, it says, against generators who do not sell electricity in this state. In other words, it is the fact that the utilities in plaintiff's state are not New Mexico gross receipts taxpayers and have no gross receipts tax liability against which to credit electrical energy tax which produces the alleged invidious discrimination.

The rational basis for allowing the credit of electrical energy tax against gross receipts tax is the obvious legislative intent to tax the commodity of electricity, from generation to consumption, once and only once.

The precedents which uphold New Mexico's tax structure against the argument that it discriminates against interstate commerce have the same force for equal protection and privileges and immunities purposes. So long as the total tax burden on in-state generators and sellers of electricity is equal to or, as in this case greater than the burden on generators who sell outside the state, there is no unlawful discrimination against interstate commerce, and there can be no unlawful discrimination on equal protection or privileges and immunities grounds. As a class, then, the Arizona utilities whose interest plaintiff represents are treated equally, for their tax burden is no greater than the in-state taxpayer's burden. For example, Public Service Co. of New Mexico is subject to a 4% tax, which is

a higher rate than any of the Arizona utilities will ever have to pay.

In *South Carolina Power Co. v. South Carolina Tax Commission,* 52 F.2d 515 (E.D. So.Car. 1931), aff'd 286 U.S. 525 (1932), which also involved an electricity generation tax credit against subsequent sales tax, the credit was attached as violative of the equal protection clause. The Court unequivocally rejected the utilities' contention:

> "It is argued that the sales tax . . . violates the equal protection clause of the Federal Constitution . . . because it exempts from the tax sales of current upon which the generation tax has already been paid. All current sold within the state, whether produced there or brought in from another state, pays exactly the same tax." 52 F.2d at 521.

Plaintiff cites *Austin v. New Hampshire,* 420 U.S. 656, 95 S.Ct. 1191 (1975) as "a case richly suggestive of the situation here confronted." (Br. 25) In fact the case is simply not apposite. In contrast to New Mexico's generation tax which applies to all taxpayers in a non-discriminatory manner,* under New Hampshire's commuter tax ". . . no resident of New Hampshire is taxed on his foreign income. Nor is the domestic earned income of New Hampshire residents taxed. In effect, then, the State taxes only the income of nonresidents working in New Hampshire. . . ." 95 S.Ct. 1193-94. Moreover, in *Austin* the nonresident taxpayers themselves were asserting their right to non-discriminatory treatment. Here Arizona purports to assert those personal rights on behalf of its citizens, for which the original jurisdiction of this Court is not intended. *Massachusetts v. Missouri,* 308 U.S. 1 (1939).

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* Even taking the electrical energy tax credit against gross receipts tax, New Mexico generators who sell their electricity in New Mexico are taxed at the rate of 4%.

CONCLUSION

In view of the fact that litigation pending in the New Mexico courts, which will eventually find its way to this Court, will resolve each constitutional issue Arizona attempts to present here; the fact that Arizona's interest in striking down the tax at issue is remote; and, as we submit, the fact that New Mexico's tax structure as to electricity is clearly constitutional under the precedents of this Court, Arizona's motion for leave to file its complaint should be denied.

Respectfully submitted,

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APPENDIX A

STATE OF NEW MEXICO COUNTY OF SANTA FE
IN THE DISTRICT COURT

ARIZONA PUBLIC SERVICE COMPANY
EL PASO ELECTRIC COMPANY, SALT
RIVER PROJECT AGRICULTURAL
IMPROVEMENT AND POWER DISTRICT
SOUTHERN CALIFORNIA EDISON
COMPANY, and TUCSON GAS &
ELECTRIC COMPANY,

Plaintiffs,

vs.

No. 50245

FRED O'CHESKY, Commissioner of
Revenue, BUREAU OF REVENUE, and
STATE OF NEW MEXICO,

Defendants.

COMPLAINT

Plaintiffs bring this action for declaratory judgment pursuant to the New Mexico Declaratory Judgment Act, Chapter 340, Laws 1975, with respect to the constitutionality and validity of the Electrical Energy Tax Act, Chapter 263, Laws 1975, and for their complaint herein, state:

1. Arizona Public Service Company, an Arizona corporation, generates, transmits, distributes and sells electrical energy within the State of Arizona, and is regulated as a public service corporation by the Arizona Corporation Commission.

2. El Paso Electric Company, a Texas corporation, generates, transmits, distributes and sells electrical energy within the States of New Mexico and Texas, and is regulated as a public utility in New Mexico by the New Mexico Public Service Commission and in Texas by the cities of El Paso, Van Horn, Anthony and Clint.

3. Salt River Project Agricultural Improvement and Power District (hereinafter "Salt River Project"), a political subdivision of the State of Arizona, operating a federal reclamation project pursuant to contracts with the Secretary of the Interior, generates, transmits, distributes and sells electrical energy within the State of Arizona.

4. Southern California Edison Company, a California corporation, generates, transmits, distributes and sells electrical energy within the State of California, and is regulated as a public utility by the California Public Utilities Commission.

5. Tucson Gas & Electric Company, an Arizona corporation, generates, transmits, distributes and sells electrical energy within the State of Arizona, and is regulated as a public service corporation by the Arizona Corporation Commission.

6. Fred O'Cheskey is Commissioner of the Bureau of Revenue of the State of New Mexico. The Bureau of Revenue is the agency of state government charged with the administration and enforcement of the Electrical Energy Tax Act.

7. The Four Corners Power Plant is an electrical generating station composed of five generating units and related facilities located on Indian lands leased from the Navajo Nation under Leases dated December 1, 1960 and July 1, 1966, duly approved by the Navajo Tribal Council and the Acting Secretary of the Interior.

8. Arizona Public Service Company owns and operates generating units Nos. 1, 2 and 3 at the Four Corners Power Plant. Arizona Public Service Company, El Paso Electric Company, Public Service Company of New Mexico, Southern California Edison Company and Tucson Gas & Electric Company each owns an undivided interest in generating units Nos. 4 and 5 at the Four Corners Power Plant.

9. The San Juan Generating Station is an electrical generating station composed of two generating units (one operational and one under construction) and related facilities located in San Juan County, near Waterflow, New Mexico.

10. Public Service Company of New Mexico and Tucson Gas & Electric Company each owns an undivided one-half (1/2) interest in the San Juan Generating Station.

11. Certain of the plaintiffs (Arizona Public Service Company and El Paso Electric Company) sell electrical energy generated from the Four Corners Power Plant to a foreign country, Mexico.

12. As shown on the Map of Principal Transmission Lines annexed hereto as Exhibit "A", the electrical system of each plaintiff is directly interconnected with the system of each other plaintiff and with the electrical systems of Public Service Company of New Mexico, the U. S. Bureau of Reclamation, and Utah Power and Light Company. Southern California Edison Company's system is also directly connected with San Diego Gas & Electric Company, the Department of Water and Power, City of Los Angeles, the Pasadena Department of Water and Power, and Pacific Gas & Electric Company; its system is indirectly but substantially interconnected with the several Pacific Northwest systems and through them to other utility systems in the western United States. The interconnected transmission lines thus constitute an interstate grid encompassing the West.

13. As a consequence of the system interconnections described in the preceding paragraph, the demand for electricity in the major urban centers served by the plaintiffs in Arizona, southern California, and the El Paso area of West Texas determines in substantial degree the amount of electrical energy generated at generating stations located in New Mexico (as well as those in other states). The electrical energy generated in New Mexico in response to such demand to which each plaintiff is entitled from its generation facilities is instantaneously transmitted over existing transmission lines to that plaintiff's service area.

14. All of the plaintiffs' above-described transactions in the generation and transmission of electrical energy at the Four Corners Power Plant and the San Juan Generating Station, and the distribution and sales of such electrical energy, are in the course of commerce among the States and the Navajo Tribe of

Indians, except for the aforesaid sales of electrical energy to Mexico, certain relatively insignificant sales made by Arizona Public Service Company within New Mexico to Utah International Inc., for operation of the Navajo Mine which provides the fuel for the Four Corners Power Plant, and for certain sales by El Paso Electric Company within its service area in the State of New Mexico. All other sales or exchanges of electrical energy in New Mexico by any plaintiff are wholesale sales to other electric utility companies on the interconnected systems in interstate commerce under the exclusive jurisdiction of the Federal Power Commission. Such interstate sales give rise to no New Mexico gross receipts tax liability under the New Mexico Gross Receipts and Compensating Tax Act.

15. Each plaintiff pays income, ad valorem, franchise and other taxes imposed by the State of New Mexico or its political subdivisions on it and other taxpayers similarly situated, and income, ad valorem, sales and use (or their equivalent), franchise, excise and other taxes imposed by the state of its incorporation on it and other taxpayers similarly situated.

16. Section 3 of the Electrical Energy Tax Act, Chapter 263, Laws 1975 (hereinafter the "Act"), purports to impose on persons generating electricity a privilege tax of four-tenths of one mill "on each net kilowatt hour of electricity generated in New Mexico" for the purpose of sale.

17. Subsection 9B of the Act provides that the electrical energy tax paid on electricity generated and consumed in New Mexico may be credited against the gross receipts tax due New Mexico. No credits of any type are provided with respect to the electrical energy tax imposed upon electricity generated in New Mexico but transmitted and consumed outside New Mexico.

18. Subsection 9C of the Act directs that the credit for electrical energy tax paid on electricity generated and consumed in New Mexico shall be assigned to the person selling the electricity for consumption in New Mexico on which New Mexico gross receipts tax is due, and further requires the assignee of

such credit to reimburse the assignor for the amount of the credit so assigned.

19. The practical operation and effect of Sections 3 and 9 of the Act is to tax the generation of electricity in New Mexico but shift the incidence of such tax to those who sell or consume that electricity outside New Mexico since the person generating and selling electricity for consumption in New Mexico receives either a credit (under Subsection 9B) against his gross receipts tax due New Mexico or a reimbursement (under Subsection 9C) in an amount equal to the electrical energy tax payable on such electricity.

20. Plaintiffs' retail sales of electrical energy transmitted from generating facilities in New Mexico to plaintiffs' respective service areas in Texas, Arizona and California are subject to certain taxes imposed by those states, or the political subdivisions thereof, or both. Such taxes are variously denominated as sales or other types of excise taxes, but are uniformly imposed upon, or passed on to consumers of electricity in those states.

21. There is no provision of law in Texas, Arizona or California whereby any of the plaintiffs are entitled to any credit, offset or rebate for the electrical energy tax imposed on them by New Mexico.

22. Public Service Company of New Mexico, an electric public utility regulated by the New Mexico Public Service Commission, with respect to its share of electrical energy generated at the Four Corners Power Plant and the San Juan Generating Station, will in practical effect sustain no additional tax burden under the Electrical Energy Tax Act due to the provisions of Subsections 9B and 9C of the Act permitting the amount of electrical energy tax paid to be assigned or credited against its gross receipts tax liability due the State of New Mexico.

23. El Paso Electric Company will in practical effect sustain no additional tax burden under the Electrical Energy Tax Act with respect to the electrical energy generated in New Mexico and sold by it to consumers in New Mexico due to the provisions

of Subsections 9B and 9C of the Act allowing the electrical energy tax to be credited against its New Mexico gross receipts tax liability.

24. Plains Electric Generation and Transmission Cooperative, a New Mexico corporation, generates electrical energy at its generating plant near Algodones, New Mexico, and transmits and sells electrical energy solely to New Mexico electric utilities which are its members; however, by reason of Subsections 9B and 9C of the Act, it will incur no additional tax burden due to the Electrical Energy Tax Act.

25. Plaintiffs are informed and believe, and therefore allege, that no additional tax liability under the Electrical Energy Tax Act is incurred by any other person (as defined in the Electrical Energy Tax Act) engaged in the same business as plaintiffs upon electrical energy generated and consumed in New Mexico, due to the availability of the crediting provisions provided for under Subsections 9B and 9C of the Act.

26. Plaintiffs are informed and believe, and therefore allege, that all, or virtually all, of the additional taxes claimed to be due under the Electrical Energy Tax Act after application of Subsections 9B and 9C of the Act, will be borne by those persons, including plaintiffs, engaged in the generation of electricity in New Mexico which is transmitted across and consumed outside the boundaries of the State of New Mexico.

27. Plaintiffs are informed and believe, and therefore allege, that the Act was enacted for the purpose of and the view to placing the exclusive burden of paying additional tax revenues to the State of New Mexico upon transactions in commerce among the several states and with the Indian Tribes.

28. The language of the Act, coupled with the practical application of the tax, constitutes a tax on the privilege of engaging in commerce among the several states.

29. Plaintiffs contend that the Act is unconstitutional and void for each and every one of the following reasons:

A. The Electrical Energy Tax Act violates the Commerce Clause of Article I, Section 8 of the United States Constitution by deliberately and invidiously discriminating against and imposing direct and multiple burdens upon each plaintiff's interstate commerce in the transmission and sale of electricity.

B. Application of the Electrical Energy Tax to these plaintiffs, measured by electricity generated in New Mexico for transmission and sale in interstate commerce, is arbitrary, capricious and unreasonable and denies to each plaintiff the equal protection of the law, and the rights, privileges and immunities enjoyed by other members of the class defined as persons generating electrical energy in New Mexico, in violation of Section 1 of the Fourteenth Amendment to the United States Constitution, and of Article II, Section 18, and Article IV, Section 26 of the New Mexico Constitution.

C. The Act deprives plaintiffs of property without due process of law in violation of Section 1 of the Fourteenth Amendment to the United States Constitution and Article II, Section 18 of the New Mexico Constitution.

D. The Act violates Article I, Section 8, Clause 3, and Article I, Section 10, Clause 2 of the United States Constition.

30. Plaintiffs are informed and believe, and therefore allege, that defendants contend the Act is constitutional with respect to the matters set forth in paragraph No. 29 of this Complaint.

31. The plaintiffs, being persons whose rights, status or other legal relations are affected by the Act, request that the Court determine the questions of validity arising under the Act.

32. A genuine controversy exists between the plaintiffs and defendants with respect to the matters hereinbefore alleged; however, there is no controversy respecting the amount of the tax which would be payable by any plaintiff, if the Act is valid, nor with respect to the form or accuracy of any assessment of tax thereunder.

33. Due to the necessity to construe and apply provisions of the United States Constitution and the New Mexico Constitution in order to resolve the controversy between plaintiffs and defendants, plaintiffs have no other plain, speedy and adequate remedy.

34. All conditions precedent to the commencement and maintenance of this action have occurred or been met.

WHEREFORE, plaintiffs pray:

A. That this Court adjudge and declare the Electrical Energy Tax Act, Chapter 263, Laws 1975, to be unconstitutional and void.

B. That upon final hearing and determination the defendants be enjoined from enforcing the Electrical Energy Tax Act and plaintiffs have such other and further relief as may be proper in the premises.

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APPENDIX B

STATE OF NEW MEXICO COUNTY OF SANTA FE
IN THE DISTRICT COURT

Arizona Public Service Company, et al., Plaintiffs,

vs.

Fred O'Cheskey, et al., Defendants.

No. 50245

MOTION TO DISMISS

Pursuant to Rules 12(b)(1) and 12(b)(6) of the Rules of Civil Procedure, Defendants Fred O'Cheskey, the Bureau of Revenue and the State of New Mexico move the court to dismiss Plaintiffs' complaint on the grounds that:

1. This Court lacks jurisdiction over the subject matter of this action because of Sec. 72-13-36, N.M.S.A. 1953 which provides:

> No court of this state has jurisdiction to entertain any proceeding by a taxpayer in which he calls into question his liability for any tax or the application to him of any provision of the Tax Administration Act [72-13-13 to 72-13-92], except as a consequence of the appeal by him to the court of appeals from the action and order of the commissioner all as specified in Sec. 72-13-38, N.M.S.A. 1953 Comp., or except as a consequence of a claim for refund as specified in Sec. 72-13-40 N.M.S.A. 1953 Comp.

2. Inasmuch as the Electrical Energy Tax Act does not, as a matter of law, violate any of the federal or New Mexico constitutional provisions which plaintiffs allege it does, the complaint fails to state a claim upon which relief can be granted.

Defendants' reasons and legal precedents upon which this motion is based are set forth in the brief annexed hereto.

/s/ Toney Anaya
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Attorney General

/s/ Jan Unna
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CERTIFICATE OF SERVICE

I certify that the foregoing Motion, together with the brief in support thereof, was served by mailing a copy to each opposing counsel of record this 10th day of November, 1975.

/s/ Jan Unna
JAN UNNA
Bureau of Revenue
Assistant Attorney General

WESTERN SYSTEMS COORDINATING COUNCIL
OPERATIONS COMMITTEE
MAP OF PRINCIPAL TRANSMISSION LINES

JANUARY 1, 1975